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Book Review. The Growth of American Law: The Law Makers by James Willard Hurst

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156 Mich. 228, 120 N.W. 618 (1909). Although in these cases the taxes do not seem unreasonable inasmuch as two parties were taxed on separate property rights, the taxes in the instant case contain an element of unfairness since levied on a single taxpayer who could derive benefit from only one of the two interests taxed. The sisters could have had either the use and occupancy of the real estate or the balance of the purchase price, but both rights could not have been enjoyed concurrently. The decision seems contrary to the general pattern of Connecticut tax statutes, which utilize a system of deductions to avoid double taxation. Thus a debt unsecured by real estate may be deducted from the debtor's taxable property to the extent of the assessed value of the property for which the debt was incurred, CONN. REV. GEN. STAT. § 1797 (1949), and a mortgagee is taxed on the face value of the note less the assessed value of the debtor's real estate, CONN. REV. GEN. STAT. § 1776 (1949). Imposition of the tax on intangibles could have been avoided by holding that delivery of the deed in escrow, without transfer of possession of the real estate, was not sufficient performance by the sellers to give rise to an unconditional and liquidated right, ordinarily necessary to constitute a taxable chose in action, cf. *Eric v. Walsh*, 135 Conn. 85, 61 A.2d 1 (1948), particularly since sellers had the continuing obligation to maintain the property. See *Hartford-Connecticut Trust Co. v. O'Conner*, *supra*, at 12 (dissenting opinion). On the other hand, a tax on the sellers' interest in the contract might be supported on the ground that a right to sell at will for a set price represented an additional value distinct from that of mere ownership of realty. But such a tax would properly be based on the actual value of that interest, presumably derived from the amount, if any, by which the purchase price exceeds the market value of the land. Either of these two results would be more in accord with the usual rule that a double tax will not be imposed unless a contrary legislative intent is clear. See *House of Hasselbach v. McLaughlin*, 127 Conn. 507, 510, 18 A.2d 367, 368 (1941). While a state might constitutionally tax both the land and its full realizable value when fixed by contract, cf. *State v. Royal Mineral Ass'n*, 132 Minn. 232, 235, 156 N.W. 128, 130 (1916) (state may tax rent not yet accrued or payable), it seems doubtful that the Connecticut legislature expected its tax provisions to achieve such a result.

BOOK REVIEWS

THE GROWTH OF AMERICAN LAW: THE LAW MAKERS. By James Willard Hurst.¹ Boston: Little, Brown and Company. 1950. Pp. xiii, 502. \$5.50.

"Law moves with the main currents of American thought" (p. 13). "Because society, and laws as a tool of society, are made by men, for men, they cannot help having the nature of men in them" (p. 15). Thus,

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Hurst sets the stage for his account of our people seeking, through the processes of government, to express the needs and greeds of men trying to adjust their received idealisms and philosophy to a fluctuating environment.

In this volume there is no pretentious attempt to expound a sociological, pragmatic, or functional analysis of the law. There is no frontal attack upon the conceptualism of a law measured in terms of rigid compartments of contract, tort, and property. Hurst's story is a simple, inductive description of the kind of people who make law in succeeding generations, in particular physical surroundings, and for specific, though often conflicting, objectives. If the reader concludes that the law as frequently taught and practiced is but a feeble shadow of the ever-changing law of our society, it is a conclusion that the writer has not forced upon him. The power of this volume is its creativeness; its strength is its objectivity.

Hurst's panorama of law-making highlights the legislature, the constitutional convention, the judiciary, the bar, the law school, the administrator, and the executive as institutions for adjusting or resisting adjustments of law in society. No mechanical assembly of constitutional limitations, important measures passed, legislative procedures, cases won and lost, or a Who's Who of distinguished personalities, *The Growth of American Law* is a portrayal of living institutions acting competitively to determine the course of society. It pictures legislatures reflecting and creating public opinion. Legislative debates, investigating committees, patronage, the creation of administrative agencies — all underscore the legislature's desire to retain the power to determine policy, to hold on to its "right to review, and ratify or veto." As Hurst emphasizes, in the battle for power "the legislature . . . showed a tough vitality that belied some of the gloomier bedside bulletins of the attending doctors of political science" (p. 81).

And the human side is presented also. Hurst portrays legislators not seeking solely to advance the needs of society but defending the interest of privilege for their own personal advantage; legislators, calloused to even the minimum ethical standards, and legislators fighting, at the risk of their political futures, for what they, as individuals, considered fair and just; legislators creating administrative tribunals to provide "impartial justice" and then acting as "middle-men" for private clients and endeavoring to defeat the very policy they helped create.

In the scramble for supremacy, and without regard to the supposed separation of power, the judges did not devote their exclusive attention to the settlement of disputes but sought also to reflect, through their constitutional authority, statutory interpretation, and the common law, their judgment of the "true nature" of our society. First, with confidence and assurance that the hard-edged rules of law really controlled their decisions, the courts determined the law. And then "there was a drastic change in approach when courts sought to view an act in terms of its own particular genealogy and in effect to fashion their principles of construction from the materials of the statute's own environment and ori-

gins" (p. 188). This was a fair self-restraint, but perhaps too late to save the courts' reputation with the public because of other deficiencies in the judicial system. Indeed, Hurst observes that "[n]ot the least disquieting aspect of our judicial history was the extent to which this sturdy regard for the court may have been shaken since 1890 — not by corruption and evil-doing, but by the demonstrated inadequacies of the system in making justice available to the poor and to people of small means, and by the weaknesses of its procedures, its investigating processes, and its available sanctions for coping with issues presented by the concentration of economic power" (p. 195).

If the courts appeared deficient, so also the lawyers; tempted, as Hurst views them, to follow the deepest pockets; to be concerned with bar organization and illegal practice only when the economic position of the profession was threatened; to be unmoved by the needs of little men for lawyers' services. And yet Hurst sees signs that are encouraging: the National Bar Program; the movement for integrating the bars; the pressures on law schools for increased standards of admission. Remaining are important jobs as yet undone: histories of state and local bars and their members; complete and accurate judicial statistics; serious concern for the administration of justice for all members of society.

The chapters on the bar tell of lawyers' preoccupation with the courts when the vital controversies were finding administrative resolution — a fitting introduction to executive and administrative law-making. With unusual force, Hurst traces the interweaving of legislative, administrative, and judicial institutions, all seeking final power to determine policy. These chapters provide a natural summation, both chronologically and functionally, of the law-making process as it operates today, a summation which attempts to declare no winners, asserts no philosophical yardsticks of right and wrong, but rather paints the picture in terms of men and institutions functioning in time and space, with the weakness and the strength of our people.

As a conclusion to the volume and as an introduction to the future study of legal history in the United States, chapter 17 reviews the changes in our society, which Hurst characterizes as a shift from a "subsistence to a market economy," with our people attending only to their interests as producers and ignoring their interests as consumers; with "a diminished political sensitivity and a growing impersonality in people's dealing with one another" (p. 440). The result has left no popular concern for the problems of government, has made the politician the whipping-boy for discontent, and, except for producer interests, has not made him a servant. Small wonder, then, that many able men have shunned public office; that few, save the strongest executives, have been accepted as truly representative of the public interest.

This, in short, is the pace and cut of Hurst's work. Its coverage is so large, its implications so multiple, that to find flaws in particulars would indeed be to miss the point of the whole undertaking. A fair review cannot help but be laudatory of the conception and execution of the project of which this volume is but an introduction. Here is a frame-

work for historians, social scientists, and lawyers. Scarcely a page does not suggest the need for another volume. Cataloged in this easily read story are hundreds of creative suggestions for fundamental researches into the nature of law and government. The opportunities that have been created by this work require serious attention in all legal and social science research programs.

For lawyers and laymen, Hurst may, indeed, in a different and better way, be the Blackstone of the twentieth century.

FRANK E. HORACK, JR.*

CASES AND TEXT ON PROPERTY. By A. James Casner¹ and W. Barton Leach.² First standard edition. Boston: Little, Brown and Company. 1950. Pp. xliii, 1326. \$9.00.

A new casebook for use in the first year property course at the Harvard Law School has been an event of infrequent occurrence. John Chipman Gray's pioneering magnum opus first appeared in 1888 and was followed by a second edition seventeen years later.³ A change in the materials of the first-year courses was the occasion for, if not the cause of, the issuance of the late Professor Edward H. Warren's casebook in 1915.⁴ Twenty-three years later another change in the curriculum led to the publication of a second edition of Warren's book.⁵ But the formidable shadow of Gray loomed large over both these books. Not until the temporary editions of Casner and Leach's new work were published did a definite cleavage with the past appear. Thus, the passage of time had troubled but little the placid, if not stagnant, waters of the property course.

This long-awaited first standard edition of Professors Casner and Leach's case-and-text book is traditional in the sense that the raw materials with which the authors must work are traditional. The difference comes in the way in which the materials are handled. The book has a quality of crisp freshness. It begins with a dissenting preface and ends with an index reference to zoning. Throughout, there is a fusion of scholarship, wit and imagination implemented by a teaching skill that is extraordinary. And there is a minimum of the arid conceptualism that for centuries has lain like a blight on this field of the law and still permeates many of the modern casebooks. Correlation between legal doctrine and the functions of the lawyer in society is a recurrent theme.⁶

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³ GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY (1888; 2d ed. 1905).

⁴ WARREN, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY (1915).

⁵ WARREN, CASES ON PROPERTY (2d ed. 1938).

⁶ See, for example, the introductory note for student reading (pp. 3-8); the introduction to Part VII (Landlord and Tenant) dealing with "Problems As They Come To The Lawyer" (pp. 429-33); and the introduction to Part VIII (The Modern Land Transaction) discussing "The Processes By Which The Legal Profession Seeks To Provide Security Of Land Titles" (pp. 611-12).